No. 412.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,
Plaintiff in Error,

vs.

CARBON HILL COAL COMPANY,
A CORPORATION,
Defendant in Error.

No. 412.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the District of Washington, Western Division.

Tacoma.

GOVNOR TEATS AND FREDERICK A. BROWN,
Attorneys for Plaintiff in Error.

No. 412.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,
Plaintiff in Error,
vs.
CARBON HILL COAL COMPANY,
A CORPORATION,
Defendant in Error.
} *No. 412.*

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the District of Washington, Western Division, Tacoma.

GOVNOR TEATS AND FREDERICK A. BROWN,
Attorneys for Plaintiff in Error.

STATEMENT.

This case is here on a demurrer to the amended complaint sustained by the Court below. The amended complaint sets forth facts practically as follows:

The defendant below is a coal mining company, organized under the laws of California, and owning and operating a coal mine in Pierce County, Washington, called the "Carbon Hill Coal Mine." They have operated this mine for several years last past. (1st par. Am. Com. Record, 4–5.)

The plaintiff had for about eight years prior to the 22nd day of June, 1896, been in the employ of the defendant Company, digging and mining its coal. (Par. 2, Record, 5.) He was a miner by trade, forty-three years of age, and at the time of the accident in good health. He was always considered a careful and cautious man in dangerous places while mining the several years in the Carbon Hill Mine for the defendant in error. (Par. 10, Am. Com. Record, 11.)

There are great accumulations of natural gas in the mine which have a tendency to fill the mine as the coal is being dug (3rd Par. Am. Com. Record, 5.) To understand this fact thoroughly this Court should understand the contour of the mine and how it is worked, and we have taken the liberty to attach to this Brief a map, showing the same, as well as possibly could be made, and the facts as therein shown are described in paragraph 6 of the Amended Complaint. (Record, 6–7.) The vein of coal does not lie horizontal with the lay of the country as does most veins of coal,

but lies at an angle in the earth, having a pitch of about 45 degrees. The mining is done about this wise: After the shaft is sunk, and some mining is done, the pillars taken out, the gangway is driven further along on a level in the vein of coal, and when it reaches a point about forty feet from the last made chute, another chute is driven, which is called chute No. 1. (See map showing gangway and chute No. 1.) The chute is driven up the vein of coal leaving a pillar. Upon reaching about forty feet up the chute an air passage is driven across the pillar, connecting with the old chute, which air passage is called a cross-cut. (Marked on the map A and B.) The work of driving the chute is continued up the vein of coal for a distance of forty or forty-five feet. Then, the gangway being driven forty or more feet along the vein, past chute No. 1, chute No. 2 is driven. The air is forced to the face of the working place by a contrivance known to the miners as a "brattice," shown on the map as H and I. When the second chute reaches about forty feet up the gangway, a cross-cut is driven similar to the one in the first chute, connecting with the first chute, (marked on the map A.) This is known as cross-cut No. 1. When that is done, a gate is placed at the entrance of chute No. 1, (marked on map E,) which changes the course of the air through the first cross-cut and down chute No. 2, or up to the face of the working place in chute No. 2, by reason of the brattice which the miner arranges, and then down chute No. 2 and along the brattice, 1, to the face of the

working place in the gangway. When the miner has reached a point about forty feet up the vein of coal in the second chute from the first cross-cut, another cross-cut or air passage is made, connecting with chute No. 1, (marked on the map B.) Cross-cut No. 1 is then closed by a canvas gate (marked on the map F) and the air forced up chute No. 1 to and through cross-cut No. 2 to the face of the working place in chute No. 2. As the miner drives the chute upwards he conducts the air to the face of the working place by his canvas brattice, H. The air then goes down the chute to the working place in the gangway and out, clearing the mine of smoke and gas. The natural tendency of the gas is upwards to the face of the working place in the chute by reason, first of its lightness, and second the pressure of the air below. The tendency of the air is the way of least resistance, which is down into the gangway and out of the mine.

The laws of the State of Washington prescribe that a "volume of air shall be forced and circulated to the face of the working place throughout the mine so that the same shall be free from standing powder smoke and gases of every kind." (Par. 4, Am. Com Record, 5-6.) The law further prescribes that no less than one hundred cubic feet shall be issued per minute per man to the face of the working place, but its object is that a sufficient amount of air shall be forced and circulated to the face of the working places so as to free the same from smoke and gas.

In accordance with the laws of the State, and for the

purpose of providing a safe place for the miners to work, the defendant had in its employ one John Lowery on the 22nd day of June, 1896, whose duty it was to oversee and conduct the air and ventilation, and to provide a safe working place for the miners. He is known as a "fire boss." (Par. 5 Am. Com. Record, 6.) He fixed, managed and arranged the gates and conducted the ventilation for the safety of the miners at work. (Par. 7 Am. Com. Record, 8.)

On the 22nd day of June, 1896, plaintiff was ordered, directed and assigned to mine coal in chute No. 2, and went to work driving said chute at the face of the working place (marked on the map "O,") which was forty-five feet above the second cross-cut B, and eighty-five feet above the first cross-cut A, and one hundred and twenty-five feet above the gangway. (Par. 6, Record, 6–7.)

A short time before the accident complained of occurred, the plaintiff noticed gas accumulating at the face of the working place "O," which accumulation was due and owing to insufficient ventilation at the said face of working place. The lack of ventilation at the face of the chute was due and owing to the facts as follows:

1. The fire boss, John Lowery, managed and arranged the canvas gate in cross-cut No. 1, (marked on the map F) so as to leave a wide space or opening, splitting the air, as indicated by the arrows on the map, and a greater volume of the air passed through the opening and down and out of chute No. 2, as

indicated by the arrow on the map, and did not reach the face of the working place O where plaintiff was working, to clear the same from gas and smoke.

2. In the defendant ordering and providing cross-cuts at the distance of forty feet apart, whereas they should be not more than thirty feet apart to insure ventilation sufficient for safety at the face of the working place O. (7th Par. Am. Com. Record, 8.)

Soon after noticing said accumulation of gas, plaintiff complained to the said fire boss that there was gas accumulating at the face of said chute No. 2, and notified said fire boss that the accumulation was due to the opening in the canvas gate F in the first cross-cut, and then and there requested said fire boss to furnish his working place with better ventilation. The fire boss neglected to do his duty in this regard and wilfully and negligently allowed gas to accumulate at the face of the chute O in large quantities. (Par. 7, Am. Com. Record, 9.)

The plaintiff in pursuance of his regular course of duty and employment, and thinking and believing that said fire boss had performed his duty according to law and freed the face of said chute from gas, proceeded to the face of the working place O for the purpose of lighting and setting off a charge of giant powder by a fuse, and in his usual way and manner and practice in said mine, lighted a match for the purpose of lighting the said fuse, but the moment the match was lighted the accumulated gas exploded, throwing plaintiff violently to the bottom of the chute, burning and muti-

lating his face and arms, burning and destroying both of his eyes so that the same are beyond recovery, and making him totally blind for the remainder of his life-time. (Par. 7, Am. Com. Record, 9–10.)

Plaintiff demands judgment for $50,000 and costs.

Defendant filed a demurrer stating two grounds:

1st. That the amended complaint does not state facts sufficient to constitute a cause of action, and

2nd. Want of jurisdiction of Court below. (Record, 12–13.)

The argument and Court's decision was upon the first ground.

Upon argument of the demurrer to the Court below and after consideration, the Court sustained the same and the plaintiff excepted to the order sustaining said demurrer, and exceptions were allowed by the Court. (Record, 14–15) The plaintiff, desiring to stand on his amended complaint, gave notice in open Court of the fact, and the Court then and there dismissed the cause and rendered judgment accordingly. (Ibid p. 15.) Plaintiff took exceptions to said order of dismissal and exceptions were allowed by the Court. (Ibid p. 15.) Plaintiff gave notice of appeal in open Court, and the same was duly noticed in the order and judgment of dismissal. (Ibid p. 15.)

Plaintiff thereafter filed his assignment of errors (Record, 16,) and sued out his writ of error, which was allowed by the Honorable C. H. Hanford, United States District Judge, and one of the Judges of this Honorable Court. (Ibid p. 18–19,) and asks a reversal

of the order sustaining the demurrer and the order and judgment of dismissal of this case below.

ASSIGNMENT OF ERRORS.

Plaintiff in error assigns as material errors of record as follows:

I.

That the Court erred in sustaining the demurrer of the defendant therein to the amended complaint of the plaintiff therein for the reason that the said amended complaint states a complete cause of action against the defendant therein.

II.

That the Court erred in rendering judgment therein, dismissing the plaintiff's action therein, for the reason that the said judgment was contrary to law.

ARGUMENT.

We contend that the Court erred in sustaining the demurrer and dismissing the cause below, for the facts stated in the Amended Complaint are sufficient to constitute a cause of action for damages against the defendant Company, and then, as Chief Justice Fuller says, in Gardner vs. Mich. Cen. R. Co., "The question of negligence is one of law for the Court only where the facts are such that all reasonable men must draw the same conclusions from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." (14 Sup. Ct. Reptr. 144) It is true he was commenting upon the Court's duty upon demurrer to the evidence or motion to withdraw from the jury.

Plaintiff's Amended Complaint is exceedingly full and complete, and a multitude of witnesses could not add to the facts The Plaintiff was mining coal at the face of a chute 125 feet from the gangway. The law of Washington compelled the Company to have such a circulation of air at that place as to free it from gas and smoke. The law of Washington referred to is a part of Sec. 9, Ch. LXXXI, Laws of 1891, entitled "An Act Relating to the Proper Ventilation and Safety of Coal Mines, etc.," which is as follows:

(Sec. 9.) "The owner, agent or operator of every

coal mine, whether operated by shaft, slope or drift, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than 100 cubic feet for each person per minute, measured at the foot of the downcast, the same to be increased at the discretion of the inspector, according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine so that said mine shall be free from standing powder smoke and gases of every kind."

The common law imposes this duty as well as the statute law. The fire boss split the air and only a portion reached the face of the working place in chute No. 2; gas accumulated; an explosion occurred; plaintiff was damaged. The gas exploded because of its accumulation, it accumulated because of a lack of air circulating up at the face of the working place of the chute; the lack of air was because a portion was allowed to go through the first cross-cut; the air went through the first cross-cut because of the defectively arranged canvas gate. Can it be said "That all reasonable men must draw the same conclusion" as the Court below?

While there is conflict among the authorities on many points and features on the law of negligence arising between master and servant, there is little, if any, on the point that "an obligation rests upon the

master to exercise ordinary care in providing a reasonably safe place for the servant to work, and also to use ordinary diligence in keeping it thereafter in a reasonably safe condition." (Gowen v. Bush. 76 Fed. 352.) And it is part of the contract of employment—"An obligation the more important and the degree of diligence in its performance the greater in proportion to the dangers which may be encountered." (Hough v. Ry. Co 100 U. S. 218.) There are several leading cases in the State Courts upon this point, but as they are cited and copiously copied from in the U. S. Court decisions, we will simply refer to and cite United States Court decisions.

The first of the leading cases decided by the United States Supreme Court upon this point is the Hough case cited above. This case was a critical review of the authorities upon the points, "What are the natural ordinary risks incident to the work in which the servant engages; what are the perils which in legal contemplation are presumed to be adjusted in the stipulated compensation; who within the true sense of the rule or upon grounds of public policy are to be deemed fellow-servants in the same common adventure or undertaking?"

Speaking of the exceptions to the rule of the law in relation to fellow-servants, the Court say: (p 217,) "One and perhaps the most important of those exceptions arises from the obligation of the master, whether a natural person or corporate body, not to expose the servant when conducting the master's business to

perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.... The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation."

This case is followed in the case of N. P. R. Co. v. Herbert, 116 U. S. The Court said upon this point (at p. 648): "The servant does not undertake to incur the risks arising from the want of sufficient and skillful co laborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by the Courts of the highest character that it

can hardly be considered as any longer open to serious question."

The next case of note is the case of B. & O. R. v. Baugh, (13 Sup. Ct. Reptr. 914) This case is important because of the clearness of the decision. At page 922 the Court say, in approval of the Hough and Herbert cases cited above, and in relation to the point at issue: "This Court recognized the master's obligation to provide a reasonably suitable place and machinery and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was as immaterial how, or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of the co-employee but upon the character of the act itself and a breach of the positive obligation of the master."

These cases, it is true, apply to the principle of safety physical appliances, but the same principle applies as to the place the servant is to perform the work of the master. The leading case directly on this point in the U. S. Supreme Court is Gardner v. Mich. Cen. R. Co. (14 Sup. Ct. Reptr 140.) The servant was injured by a hole in the planking where he was working at coupling cars. After citing the Hough case and reiterating the doctrine herein quoted, the Court said: (at p. 143,) "The principles are reiterated in very many authorities and among them in Snow v. R. R. Co., 8 Allen 441, referred to with approval by the Supreme Court of Michigan in this case and much in point. It

was their rule that a railroad company may be held liable for an injury to one of its servants which is caused by want of repair in the road-bed of the railroad and that if it is the duty of a servant to uncouple the cars of a train and this cannot be easily done while the train is still, and he endeavors to uncouple them while the train is in motion, and steps upon the cars and meets with an injury which is caused by want of repairs of the road-bed, the Court cannot rule as a matter of law that he is careless but should submit the case to the jury, although he continued in the employment of the company after he knew of the defect. The approximate cause of the injury was a hole in one of the planks laid down between the rails of the defendant's railroad where it crossed the highway, which had existed for more than two months to the knowledge of the plaintiff, who had complained of it to the repairers of the tracks of the railroad. The Supreme Judicial Court of Massachusetts held that the defendant was not relieved of its liability to the plaintiff by reason of any relation which subsisted between him and it at the time of the accident arising out of the employment in which he was engaged, because among other reasons it did not appear that the defect in the road was the result of any such negligence in the servant as to excuse the defendant, but was caused by a want of repair in the superstructure between the tracks of the defendant's road which defendant was bound to keep in a suitable and safe condition so that plaintiff could pass over it without incurring the risk of injury. The lia-

bility was rested on the implied obligation of the master under his contract with those whom he employs to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he entrusts the duty. We regard this doctrine as so well settled that in R. R. Co. v. Cox (145 U. S. 593-607) and 12th Sup. Ct. 905 we contented ourselves without discussion with a reference to some of the cases in this Court upon the subject."

The Circuit Court of Appeals have had occasion to pass on cases with facts almost identical with the facts in this case. The case of U. P. Ry. Co. v. Jarvi, 53 Fed 65, was what we might call "the falling rock case." A rock in a gangway of a mine fell and injured a miner. Judge Sanborn, rendering the opinion for the Court, said upon the point we are discussing: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employee may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury It must be commensurate with the character of the service required and with the

dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth in a mine than by him who places his employee on the surface of the earth where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and throughout all the varied occupations of mankind the greater the danger that a reasonably intelligent and prudent man would apprehend, the higher is the degree of care and diligence the law requires of the master in the protection of the servant. For the failure to exercise this care, resulting in the injury of the employee, the employer is liable; and this duty and liability extends not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended." The Court here cites many authorities. Then, wishing to become more complete in his statement, the Judge proceeds:

"This duty and liability rest upon the same principle and are governed by the same rules as the duty and liability to provide and keep in reasonably safe condition the machinery and tools furnished employees. While the master is not a guarantor or insurer of the

safety of the place in which he puts his servant, or of the safety of the tools or machinery he furnishes, he is in every case bound to exercise that care and diligence proportionate to the occupation and the occasion which a reasonably intelligent and prudent man would use under like circumstances, both to provide and keep in reasonably safe condition the place of work and the machinery and appliances requisite to its performance. This duty is personal to the master and cannot be so delegated as to relieve him of liability." (R. R. Co. v. Herbert, Supra)

In speaking of the care and diligence imposed upon the master in a case of this character, the Judge said: "Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not in the first instance demanded of the servant. The former must watch, inspect and care for the slopes through which and in which the servants work, as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work with reliance upon this assumption unless a reasonably prudent and intelligent man in the performance of his work as a miner would have learned facts from which he would have apprehended danger to himself."

One Norman was injured by a defective plank in the flooring of the freight shed where he was working and sued for damages. (Norman v. Wabash R. Co. 62 Fed.

727.) The Circuit Court of Appeals for the Sixth Circuit approved the above case and said upon the point of law governing the duties between employer and employee as to a safe place for performing the work, as follows:

"The law governing the reciprocal duties of employer and employee with reference to the safe condition of the place where the employee is to work or of the machinery and tools with which he is to do his work is well settled. It is the duty of the employer to exercise ordinary care to provide and maintain a reasonably safe place in which the employee is to perform his services, so that the employee shall not be exposed to unnecessary and unreasonable risks. The employee has a right to presume, when directed to work in a particular place, that reasonable care has been exercised by his employer to see that the place is free from danger, and in reliance upon such assumption may discharge his duties in such place, unless there are obvious dangers which would lead a reasonably prudent employee either to refuse to work in the place, or to make complaint of the same to his master."

The nice questions arising in the cases where the damage was the result of negilgent foremen, superintendents, or those in charge of distinct departments, cannot come in a case of this character to call for close distinction and intricate points of law. There may be a question of contributory negligence, but that cannot be settled by demurrer; it must be left to the jury. The question is upon the character of the work

done by the negligent person. His general duties may be those of a fellow servant yet if he is entrusted with furnishing a safe place to work or safe machinery to another employee to work with, he is performing the duty of the employer as a vice-principal.

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those at least in the same work or employment, with whose habits, conduct and capacity he has in the course of his duties an opportunity to become acquainted and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business nor is it one which the servant in legal contemplation is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has ordinarily no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master. . . . The agents who are charged with the duty of supplying safe machinery are not in the true sense of the rule relied

upon to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them even when the same person renders service by turns in each, as the convenience of the employer may require." (Hough v. Ry. Co. Supra, pp. 217–219.)

The principle here laid down is followed by the Supreme Court of the United States in the Gardner case, and also in the case of B. & O. R. Co. v. Baugh, supra, in which Justice Brewer very clearly states, at p. 921:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools or the machinery than such as is obvious and necessary. Of course some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety but it does require that reasonable precautions be taken to

secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others that does not change the nature of obligations to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master."

The Justice approves the language of Justice Valentine of the Supreme Court of Kansas, in R. R. Co. v. Moore, 29 Kan. 632-644, and quotes: "And at common law, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent or employee stands in the place of the master, and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence"

It is the employer who furnishes the place for the employee to work and the tools he is to work with. Who would furnish these if the employer did not? He

is the source of these necessary things. Without a place to work for the employer and without appliances to work with there can be no relation of master and servant existing between the employed and the employer. "If no one was appointed by the company to look after the conditions of the cars (for instance) and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it, charged with that duty and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence and imposed a liability upon it." N. P. R. Co. v Herbert, Supra, 652.

Here is a test of the cases of this character. If the party entrusted by the employer furnishes the safe place or the physical appliances he certainly is performing the duties of the master and not the duties of a fellow-servant.

The case of Gowan v. Bush, 76 Fed. 349, decided by the Circuit Court of Appeals of the 8th Circuit is directly in point with every question in this case. Bush was a miner at work for Gowen, a receiver of the owner of the mine. The mine generated gas, making it dangerous to work; gas accumulated; an explosion occurred and Bush was damaged. At the trial the

"Court refused to give two instructions which were asked by the receiver, which instructions were to this effect: that two of the receiver's employees, to-wit: John Murphy and James Scarratt were fellow-servants of the plaintiff; and if the explosion was occasioned by the negligence of either of these men in failing to discover the presence of gas in portions of the mine other than the place where the plaintiff was at work, then the defendant was not liable to the plaintiff for such neglect on the part of these men. A sufficient reason why neither of these instructions should have been given in the form in which they were asked is found in the fact that in so far as the duty was devolved upon these men, (John Murphy and James Scarratt) of going through the mine from time to time and inspecting it and seeing whether it was free from gas, they were discharging a personal duty of the master, which he owed to all the miners who were at work in the mine, and while discharging such personal duty of the master these men were not fellow-servants of the plaintiff, no matter what relation they may have occupied towards him when they were engaged in the performance of other and different duties. An obligation rests upon the master to exercise ordinary care in providing a reasonably safe place for the servant to work and also to use ordinary diligence in keeping it thereafter in a reasonably safe condition. This is a personal duty of the master which he cannot devolve upon another in such a way as to relieve himself from liability in case the duty is not performed, or is discharged in a negligent manner."

The Court then cites and quotes from the case of R. R. Co. v. Jarvi, supra, and ends its conclusions as follows: "It is evident, we think, that the instructions and questions were faulty and ought not to have been given for the reason that they exempted the receiver from responsibility for the negligent performance of one of his personal duties, to-wit: the duty of properly inspecting the mine and seeing that it was kept in a reasonably safe condition."

Now, let us apply the facts in this case to the law as almost universally held by the Courts and herein partially set out. The defendant in error was operating a coal mine, large quantities of gas accumulated in the mine or came out of the coal as it was mined, which would fill the mine, and made it dangerous to operate. (Rec. p. 5.) On the 22nd day of June, 1896, the company sent plaintiff in error to his working place to mine its coal. (Rec. p. 6.) That working place was 125 feet up from the gangway. All the gas of the mine in the proximity of chute No. 2 would accumulate at the face thereof. This company said to the plaintiff, in law and as part of its contract, "Go to the face of the working place of chute No. 2 and mine coal and it will be reasonably safe. A circulation of air is provided in such quantities as to free the place from smoke and gas. The duty of the fire boss is to see you safe. We have entrusted that work to a reasonably careful person and you shall be safe as far as lies in the company's power to make it so." With this contract, this

safeguard surrounding him the plaintiff in error went to the face of the working place of chute No. 2 and commenced mining coal. He soon found gas accumulating and on his way down the chute he noticed the gate in the first cross-cut partially open and a large volume of air passing down and out of the working place and not circulating at the face of the working place. (Rec. p. 8.) He notified the fire boss of the accumulation of gas and the defective gate in the first cross-cut. (Rec. p. 9.) It then became the duty of the fire boss to arrange the gate and have more circulation of air at the face of the working place of chute No. 2. Plaintiff in error had a right to depend on that duty being performed; he had a right to believe it was performed; believing the fire boss had performed his duty, he went to the working place and in his usual way lit a match to light the fuse attached to a charge of giant powder to make a blast. The fire boss had not done his duty. He negligently allowed the gate to remain open and the gas to accumulate at the plaintiff's working place. The air being split and only a portion going around through the second cross-cut, the tendency of all the gas carried on the current of the air as it passed through the mine was to accumulate at the face of chute No. 2. The gas carried on the current would naturally rush to the face of the chute and not follow down with the current that went through the opening left in the gate in the first cross-cut Here was an exceedingly dangerous condition which the fire boss must have known. It was his duty to see that

the circulation of the air in the mine should be so arranged that the gas would all be carried out, instead of being carried to the faces of the chutes, by a divided current and left there to accumulate and explode to the injury of the miners. While the fire boss was at work as such he could not in any way be a fellow-servant.

The defendant in error cited the case of Morgan v. Carbon Hill Co., 6 Wash. 577, wherein the Court is wanted to say that a fire boss is a fellow-servant to the miner. But it does not say so. The Court say that at the time of the acts complained of in that case the fire boss was not a vice-principal. Morgan and the fire boss at the time of the accident were sitting in the gangway of the mine, talking of their speculations in town lots. The fire boss lit a match to light his pipe and an explosion occurred, killing both the fire boss and Morgan. One other duty of the fire boss was in directing the men to leave their place of work when he found it dangerous. This duty is natural with his duties of inspection and of managing the air circulation in the mine, and at the face of the working places. The Court say at p. 579: "The only control, if any, that Jones as fire boss had of the men was to direct them to leave the place where they were working and go to another place if their continuance at work in the first place was in his opinion dangerous; but even if we assume that in determining that question and directing the employees by virtue of the authority so given him he would be acting as a vice-principal, it

does not follow that at the time of the accident he was engaged in the duty required of him as such vice-principal. In the situation in which he found the deceased party and the witness Williams and while they were together up to the time of the accident he had by virtue of his duties as fire boss no right whatever to control their action, consequently at that time he did not stand in any such relation to them as would make the company responsible for his acts."

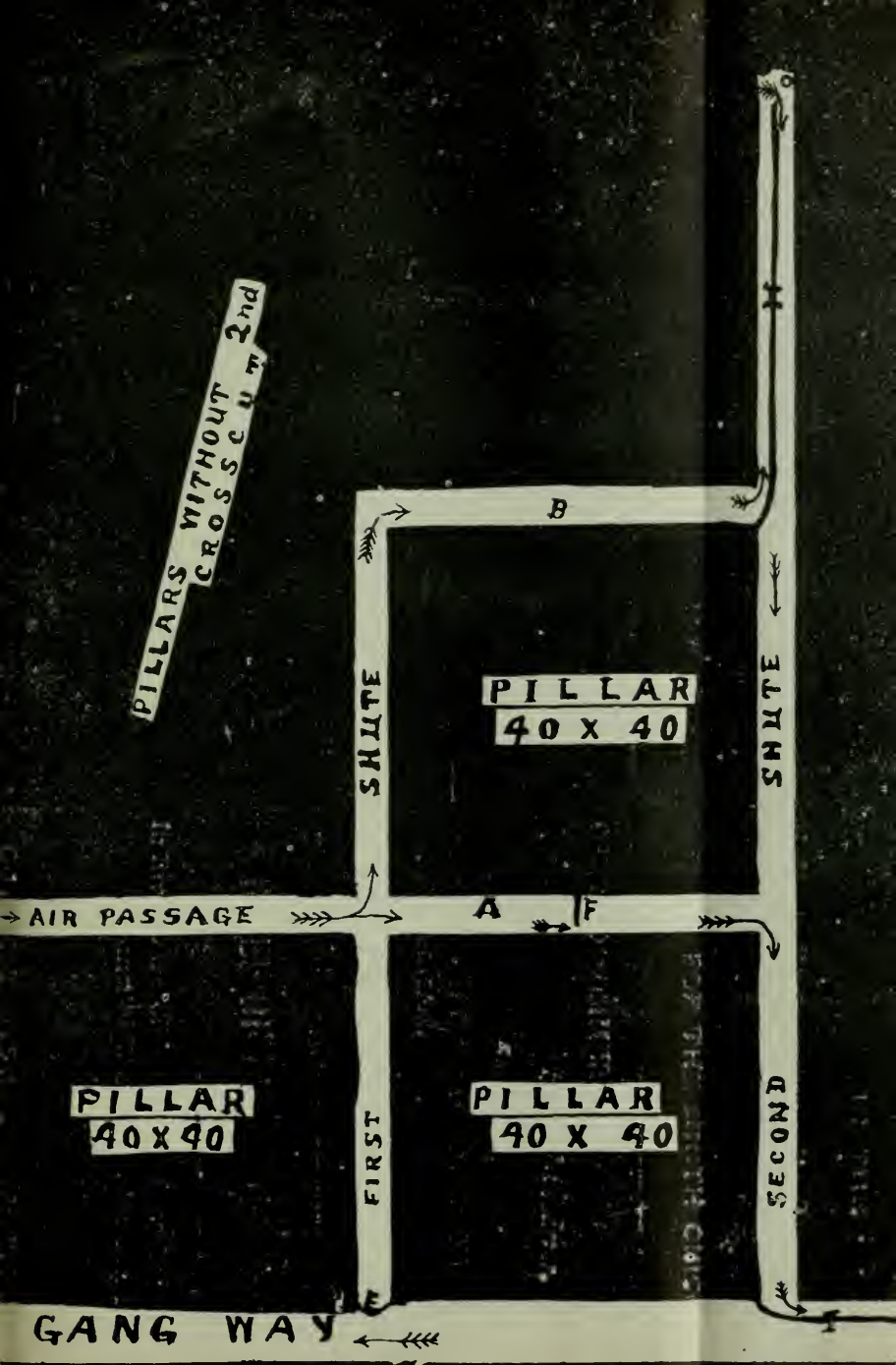
The Court seem to lay stress on "control of men" as if that had anything to do with the fundamental principles of law governing the relation of master and servant in regard to a safe place and safe appliances. This case decides nothing except that at the time of the accident the fire boss and miner were not performing their duties of employment. "Consequently at that time he (the fire boss) did not stand in any such relation to them (the miners) as would make the company responsible for his acts."

We have this much to say of this case because the Court below thought it decided as a proposition of law that a fire boss was necessarily a fellow-servant of the miners and it was his duty to follow the State Supreme Court. On both propositions the Court below was wrong. Gardner v. Mich Cen. R. Co., supra, p. 142-3, and cases cited on this point.

Under the law as declared by every decision of the United States Courts, except the Court below in this case, the duties of John Lowery as fire boss make him a vice-principal of the defendant in error. He is em-

ployed as fire boss for the "purpose of providing the said mine with air and overseeing and conducting, guiding and managing the ventilation of the said mine for the proper escape and in freeing the said mine from all gases and smoke of every kind for the safety of the employees of the said defendant commonly known as 'miners.'" (5th par. Am. Com. Rec. p. 6) Without some one to perform this work coal could not be mined for it would be death to every miner who would attempt it. Miners go into this death trap with their lives in the hands of the fire boss. A circulation of air throughout the chutes, cross-cuts, canals and gangways of the mine is as much necessary to life as it is in the pulmonary cells of the miner. The defendant company performing its duties in having a sufficient circulation of air at the face of the working places secures reasonable safety. (3rd par. Am. Com. Rec. p. 5.) That responsibility cannot be shifted so as to relieve the employer, for "the law doth give it" and the Court should have allowed it. Therein the Court below committed error, we respectfully submit.

GOVNOR TEATS and
FREDERICK A. BROWN,
Attorneys for Plaintiff in Error.



A—First Cross-cut. B—Second Cross-cut. D—Face of working place in Gangway. E—
at entrance of first Chute. F—Gate in first Cross-cut, partly open. H—Brattice in second C